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9

10 **UNITED STATES BANKRUPTCY COURT
11 EASTERN DISTRICT OF WASHINGTON**

12 In re:

13 GIGA WATT, Inc., a Washington
14 corporation,
15 Debtor.

16 MARK D. WALDRON, as Chapter 7
17 Trustee,

18 Plaintiff,

19 vs.

20 PERKINS COIE LLP, a Washington
21 limited liability partnership, *et al.*,

22 Defendants.

23 -and-

24 THE GIGA WATT PROJECT, a
25 partnership,

On January 12, 2021, the Court issued a text order pursuant to LBR 9013-1, ordering the parties to meet and confer regarding: (1) consolidated discovery, (2) jury trial, and (3) removal or referral of the putative class action pending in the District Court and (4) other matters. ECF 27. The text order further states that the

1 transmittal of the withdrawal documents will occur a reasonable time after the
2 Scheduling Conference.

3 At the status conference held on January 12, 2021 – and before Perkins
4 Coie had filed an answer which had been due on January 7, 2021 – the Court
5 asked Trustee’s counsel for the Trustee’s position regarding a jury trial. Counsel
6 said the Trustee would be prepared to discuss the issue at the next status
7 conference, which is scheduled for Friday, January 29, 2021.

8 On January 13, 2021, at the close of business, Perkins Coie filed its answer,
9 which included affirmative defenses, including setoff. This was the evening before
10 the Trustee’s response to Perkins Coie’s motion to withdraw the reference was
11 due.

12 Counsel for Perkins Coie and the Trustee conferred on January 21, 2021
13 and January 22, 2021. Counsel for Andrey Kuzenny attended. Counsel for the
14 purported class of token holders (“TH”) in the pending District Court action (the
15 “TH Action”) also attended.

16 With respect to the jury trial issue and the related issue of withdrawal,
17 Perkins Coie expressed disagreement. No substantive discussion occurred. The
18 Trustee, through counsel, stated that the Trustee would provide a writing both to
19 Perkins Coie and the Court on the issue. On January 27, 2020 at approximately
20 2:30 p.m., the Trustee sent to Perkins Coie a brief on the jury trial issue which is
21 substantively identical to the brief set forth below. The Trustee proposed that the
22 parties agree to a schedule for Perkins Coie to respond if it wished. Perkins Coie

1 responded that any further briefing would be inappropriate unless the *District*
2 *Court* allowed it. Perkins Coie added that it may move to compel arbitration.

3 This report now presents the three issues raised in the text order: (1)
4 consolidated discovery, (2) jury trial, and (3) removal/referral of the District Court
5 class action.

6 1. Consolidated Discovery

7 Counsel in the TH Action and for Perkins Coie have indicated a willingness
8 to coordinate discovery on an informal basis with the right to end the coordination
9 at any time. This issue is further addressed in section 3 below.

10 2. Jury Trial.

11 The Trustee sent the foregoing to Perkins Coie on January 27, 2021 for
12 review and comment, with an invitation to discuss. Perkins Coie declined the
13 Trustee's request to set up a supplemental briefing schedule.

14 A. Substantive Analysis

15 Invoking the Seventh Amendment, Perkins Coie would have the Court
16 squeeze the Trustee's claims into a boxed set of breach of contract claims, in
17 which they do not fit, as if the Complaint were a paradigmatic, if also completely
18 defective, action at law. For good measure, Perkins Coie has also stated that it
19 may demand that this case be heard as far away from a Spokane jury as possible –
20 before an international arbitration panel in Singapore.¹

21
22 ¹ Perkins Coie's Answer and Affirmative Defenses [[AP Doc No. 28](#), ¶ 19,
23 p. 19:22-25, p. 20:1-4.

1 However, an escrow, which forms the basis of the Complaint, is in actuality
2 “an account held on trust.” ESCROW, Black's Law Dictionary (11th ed. 2019).
3 *See Estate of Jordan by Jordan v. Hartford Acc. and Indem. Co.*, 844 P.2d 403,
4 410, 120 Wash.2d 490, 501–02 (Wash.,1993):

5 We emphasize that our holding is based on the special trust
6 relationship that exists between an escrow company and its trust
7 beneficiaries. [The escrow agent] held the escrow funds in trust for
8 the benefit of its clients. A trustee owes undivided loyalty to the
9 beneficiary of the trust. *In re Estate of Johnson*, 187 Wash. 552, 554,
10 60 P.2d 271, 106 A.L.R. 217 (1936); *see also* G. Bogert, *Trusts and*
11 *Trustees* § 543, at 56 (2d rev. ed. Supp.1992) (duty of loyalty applies
12 to most fiduciaries, including agents).

13 *Id.*, 844 P.2d at 410, 120 Wash. 2d at 501-02. In *Jordan*, the Washington Supreme
14 Court held that the concept of an escrow as a trust is fundamental to the
15 Washington Escrow Registration Act.² *Id. Accord Commonwealth Land Title Ins.*
16 *Co. of Philadelphia v. Gulf Underwriters Ins. Co.*, 1998 WL 283510, at *2
17 (Wash.App. Div. 1,1998). *See also Radach v. Prior*, 297 P.2d 605, 608, 48
18 Wash.2d 901, 905–06 (Wash. 1956) (referring to an escrow agent as “a trustee for
19 the parties, charged with the performance of an express trust governed by the
20 escrow agreement, with duties to perform for each party which neither alone can
21 forbid”) (citing 30 C.J.S., Escrows, § 8, p. 1203); *Lechner v. Halling*, 216 P.2d
22 179, 35 Wash.2d 903, 912 (Wash. 1950) (“An escrow is a trust, Restatement
23 (Second) of Trusts s 32, Comment d (1959).”).

24 Perkins Coie held the funds at issue in its “IOLTA *trust* account.” Billy
25 Gajdos, whose title is “Trust Accountant,” appears to have managed the day to

23 ² RCW Chapter 18.44.

1 day of the Escrow. And in its Answer, Perkins Coie acknowledges the trust
2 allegation by denying that Giga Watt was a beneficiary of the Escrow.³

3 Furthermore, the term, “privity,” means “[t]he connection or relationship
4 between two parties, each having a legally recognized interest in the same subject
5 matter (such as a transaction, proceeding, or piece of property). . . .” PRIVITY,
6 Black's Law Dictionary (11th ed. 2019). “Privity of contract” is only one type of
7 privity. *Id.*

8 The First Claim for Relief alleges damages against Perkins Coie for its
9 breach of the Escrow. In 1791 England – the relevant time period – the First
10 Claim for Relief would not have stated a cause of action at law because the
11 Common Law only recognized escrows relating to land transactions. CJS Escrows
12 § 3 (“The term ‘escrow’ was originally, and under the common law, applied to
13 instruments for the conveyance of land”).⁴ Furthermore, in 1791 England,
14 trusts were the exclusive province of the Chancery Court. See Story,
15 Commentaries on Equity Jurisprudence, Vol. II, Ch. XXIV.

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17
18 ³ See PC Answer and Affirmative Defenses at [AP Doc. 28](#), ¶ 3, p. 15:15-18,
19 stating, “The Plaintiff is neither a party to, nor the intended *beneficiary* of, any
20 such ‘escrow’” (Emphasis added.)

21 ⁴ The word “escrow” comes from scroll. [Merriam-Webster Dictionary](#). The
22 “escrow” was the scroll or deed that a seller of property entrusted to a third party
23 until the occurrence of a specified event. *Id.*

1 In 1791 England, the Trustee would not have had an adequate remedy at
2 law for the additional reason that Giga Watt and GW Singapore were partners in
3 the Giga Watt Project. Perkins Coie denies that a partnership existed.⁵ It also
4 seeks an accounting of the partnership funds, hoping to find that Giga Watt
5 benefitted from the embezzlement that Perkins Coie enabled.

6 A court of law in 1791 did not offer an adequate remedy at law with respect
7 to partnership disputes. Justice Story writes, “Now, a controversy may arise in
8 regard to the existence of the partnership between the partners themselves, or
9 between them and third persons.” Story, *Commentaries on Equity Jurisprudence*,
10 Vol. I, Ch. XV, § 660, p. 612. Where no written articles exist or where “they may
11 be suppressed or concealed,” *id.*, at p. 613, a court of law would not have the
12 power “to bring out all the facts.” *Id.* In contrast, a Court of Equity could obtain
13 and analyze the facts “by means of a bill of discovery.” *Id.* Justice Story
14 emphasizes how resolution of disputes regarding partners “may mainly depend
15 upon the discovery to be obtained through the instrumentality of a Court of
16 Equity.” Story, *Commentaries on Equity Jurisprudence*, Vol. I, Ch. XV, § 660,
17 p. 612.

18 Furthermore, the Trustee is both suing Giga Watt’s partner, GW Singapore,
19 and alleging that Perkins Coie aided GW Singapore’s breach of its fiduciary as a
20 partner to Giga Watt. However, under the Common Law, partners could not sue
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22 ⁵ Perkins Coie’s Answer and Affirmative Defenses. [[AP Doc. 28](#), ¶ 10, p. 3:11-
23 13.]

1 each other at law “since he cannot sue [his partners] without suing himself also, as
2 one of the partnership.” Story, Commentaries on Equity Jurisprudence, Vol. I,
3 Ch. XV, § 681, p. 631. As Justice Story wrote:

4 This review of some of the more important cases, in which Courts of
5 Equity interfere in regard to Partnerships, does, (unless my judgment
6 greatly misleads me,) establish, in the most conclusive manner, the
utter inadequacy of Courts of Law to administer justice in most cases
7 *growing out of partnerships, and the indispensable necessity of*
resorting to Courts of Equity, for plain, complete, and adequate
8 *redress.* Where a discovery, account, contribution, injunction, or
dissolution, *or even a due enforcement of partnership rights and*
9 *duties,* and credits, is required, it is impossible not to perceive, that in
many cases a resort to Courts of Law would be little more than a
solemn mockery of justice. Hence, it can excite no surprise, that
Courts of Equity now exercise a full concurrent jurisdiction with
Courts of Law, in all matters of partnership ; [sic] and, indeed, it may
be said, that, practically speaking, they exercise an exclusive
jurisdiction over the subject.

12 Story, Commentaries on Equity Jurisprudence, Vol. I, Ch. XV, § 683, pp. 632-33.

13 Therefore, it is clear that this suit is equitable.

14 Although the Trustee’s action to recover losses resulting from Perkins
15 Coie’s breach of duty superficially resembles an action at law for damages, this
16 make-whole relief was traditionally obtained exclusively in courts of equity. See
17 *Lessee of Smith v. McCann*, 24 How. 398, 407, 16 L.Ed. 714 (1861):

18 If these trusts are fraudulent, the lessors of the plaintiff have a plain
19 and ample remedy in the court of chancery, *which has the exclusive*
jurisdiction of trusts and trust estates. In that forum all of the parties

1 interested in the controversy can be brought before the court, and
2 heard in defence [sic] of their respective claims.

3 2 *Id.*, 24 How. at 407. (Emphasis added.) Money damages were also available in the
4 equity courts against a trustee. *See United States v. Mitchell*, 463 U.S. 206, 226,
5 103 S.Ct. 2961, 2972, 77 L.Ed.2d 580 (1983):

6 5 Given the existence of a trust relationship, it naturally follows that
7 [the trustee] should be liable in damages for the breach of its
8 fiduciary duties. It is well established that a trustee is accountable in
9 damages for breaches of trust.

10 7 *U.S. v. Mitchell*, 103 S.Ct. 2961, 2972–73, 463 U.S. 206, 226 (U.S.,1983). *See*
11 8 also Bogert's The Law of Trusts and Trustees § 862 (2020)

12 10 For a breach of trust the trustee may be directed by the court to pay
13 damages to the beneficiary out of the trustee's own funds, either in a
14 suit brought for that purpose or on an accounting where the trustee is
15 surcharged beyond the amount of his admitted liability.

16 12 Thus the making of unauthorized payments to other beneficiaries [or]
17 the conversion of the trust property, may give rise to a right in favor
18 of beneficiaries *to recover money damages from the trustee*. Where
19 the trustee is financially responsible this affords a remedy that is
20 usually complete and satisfactory.

21 15 *Id.* (Emphasis added). *See* Scott, Participation in a Breach of Trust, 34 Harv. L.
22 Rev. 454 (1921):

23 17 ANYONE who participates with a trustee in a breach of trust may be
24 held liable in a court of equity to the cestui que trust. If he . . . no
25 longer holds the trust property or its proceeds, he may be held liable
in equity for damages.

26 19 *Id.* (Capitalization in original; italics added for emphasis.) As summarized by the
27 Ninth Circuit Court of Appeals:

28 22 “Equity courts possessed the power to provide relief in the form of
29 monetary ‘compensation’ for a loss resulting from a trustee's breach
30 of duty, or to prevent the trustee's unjust enrichment.” [*CIGNA Corp.*
31 *v. Amara*, 131 S.Ct. 1866, 1880, 563 U.S. 421, 441 (U.S.,2011)]

(quoting Restatement (Third) of Trusts § 95, and Comment *a* (Tent. Draft No. 5, Mar. 2, 2009) (hereinafter Third Restatement)). “Indeed, prior to the merger of law and equity this kind of monetary remedy against a trustee, sometimes called a ‘surcharge,’ was ‘exclusively equitable.’” *Id.* (quoting *Princess Lida of Thurn & Taxis v. Thompson*, 305 U.S. 456, 464, 59 S.Ct. 275, 83 L.Ed. 285 (1939)).

This remedy “extended to a breach of trust committed by a fiduciary encompassing any violation of a duty imposed upon that fiduciary.” *Id.*

Gabriel v. Alaska Elec. Pension Fund, 773 F.3d 945, 954 (C.A.9 (Alaska),2014).

With respect to the defenses of set-off and recoupment that Perkins Coie asserts, set-off is governed by 11 U.S.C. § 553 and is core.⁶ It is also equitable.

See In re Buckenmaier, 127 B.R. 233, 237 (9th Cir.BAP (Ariz.),1991):

The doctrine of setoff dates back to Roman law and was recognized by the equity courts in England. . . . It was made a part of the English bankruptcy law in 1705, and became a part of American bankruptcy law in 1800.

Id. at 237. (Citations omitted). *Accord In re De Laurentiis Entertainment Group Inc.*, 963 F.2d 1269, 1277 (C.A.9 (Cal.),1992). By seeking setoff, Perkins Coie has waived the right to trial. *See In re Commercial Financial Services, Inc.*, 251 B.R. 397, 408 (Bkrtcy.N.D.Okla.,2000) (by asserting affirmative defense of setoff, the defendant “waived his right to jury trial on the breach of contract claim.”). *See also In re Iridium Operating LLC*, 285 B.R. 822, 832 (S.D.N.Y.,2002).

Traditionally non-core claims against a creditor in an adversary proceeding will be considered core if: (1) the claim arises out of the same transaction as the creditor's proofs of claim or *setoff claim*, or (2) the adjudication of the adversary proceeding claim would require

⁶ It also implicates the automatic stay pursuant to 11 U.S.C. § 362.

1 consideration of issues raised by the proofs of claim *or setoff claim*
such that the two claims are logically connected.

2 *Id.* at 832.

3 Recoupment is also an equitable doctrine. *See Matter of U.S. Abatement*
4 Corp., 79 F.3d 393 (5th Cir. 1996) (“Recoupment is equitable doctrine designed to
5 determine just liability on claim.”). *See also In re Davidovich*, 901 F.2d 1533,
6 1537 (C.A.10 (Colo.), 1990):

7 The common law doctrine of recoupment, while frequently merged
8 with the doctrine of setoff in other contexts, is a distinct doctrine in
bankruptcy cases. *This distinction arises from recoupment's origin as*
an equitable rule of joinder that permitted adjudication in one suit of
two claims, both arising out of the same transaction, that otherwise
had to be brought separately under the common law forms of actions.

11 *Id.* at 1537. (Citations omitted; emphasis added.) Therefore, Perkins Coie is not
12 entitled to a jury trial on its recoupment defense.

13 Finally, Perkins Coie emphasizes the language in *Granfinanciera*⁷ to the
14 effect that the requested remedy weighs more heavily in the right-to-jury-trial
15 analysis than the subject matter of the action. This is true when the Court is
16 reviewing a statutory claim – such as a fraudulent transfer claim brought pursuant
17 to 11 U.S.C. § 548 – and is retracing how such a claim would have been treated in
18 1791 England.⁸ If there is a tie (i.e., the subject matter indicates equity and the
19 remedy indicates legal), the remedy will break the tie.

21 ⁷ *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (U.S. Fla., 1989).

22 ⁸ As the Court is no doubt aware, fraudulent transfer actions have been actions at
23 law since at least 1571 when Parliament enacted the Statute of Elizabeth (1571).

1 In this case, no tie-breaking analysis of the subject matter (trust) and the
2 remedy (damages) is necessary because escrows are trusts, trusts were subject to
3 the exclusive jurisdiction of the Chancery Court in 1791 England, and the
4 Chancery Court had the power to make plaintiff-beneficiaries whole through the
5 award of damages.

6 B. Further Briefing Is Warranted

7 A minority of cases under different facts has held that a jury trial is not
8 waived by the defense of setoff in certain situations. *See e.g., Container Recycling*
9 *Alliance v. Lassman*, 359 B.R. 358 (D. Mass. 2007) (landlord's counterclaim
10 which was limited to recoupment or setoff did not constitute waiver of the right to
11 jury trial in trustee's action for rent); *In re M & L Business Machine Co., Inc.*, 178
12 B.R. 270, 26 Bankr. Ct. Dec. (CRR) 965 (Bankr. D. Colo. 1995) (setoff when
13 asserted as a defense is not a claim).

14 The Trustee believes that Perkins Coie should be allowed to brief the jury
15 trial issue. The Trustee would request the right to reply to Perkins Coie's brief on
16 the issue.

17 The Trustee further believes that both parties should be allowed to brief the
18 issue of whether Perkins Coie's late-filed defenses render the entire adversary
19 proceeding core. *See Iridium Operating LLC*, 285 B.R. at 832 (S.D.N.Y.,2002)
20 (setoff makes adversary proceeding of originally non-core claims into a core
21 proceeding).

22 As set forth above, Perkins Coie did not raise the setoff defense until the
23 close of business on the eve of the deadline to response to the withdrawal motion.

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1 Further, the defense was not on record during the last status conference held on
2 January 12, 2021.

3 The core/noncore issue is distinct from the jury trial issue, as it is
4 jurisdictional. It relates to this Court’s power to render final decisions and thus
5 affects the withdrawal analysis. *Piombo Corp. v. Castlerock Properties* (*In re*
6 *Castlerock Properties*), 781 F.2d 159, 161 (9th Cir.1986) (noting differences in
7 bankruptcy judge’s powers in core and noncore matters); *In re LLS America, LLC*,
8 2011 WL 4005447, at *3 (Bkrtcy.E.D.Wash.,2011) (“Bankruptcy courts have
9 jurisdiction to make final determinations in all ‘core matters,’ i.e., those ‘arising
10 under’ Title 11 or those ‘arising in’ cases under Title 11.”).

11 Bankruptcy courts make the initial determination on whether a proceeding
12 is core. *In re Vylene Enterprises, Inc.*, 968 F.2d 887, 889 (C.A.9 (Cal.),1992)
13 (“The bankruptcy court makes the initial determination whether a case is a core or
14 otherwise related proceeding. 28 U.S.C. § 157(b)(3).”).

15 3. Removal/Referral of the District Court Action

16 After further discussion, the TH will not agree to remove/refer the TH Class
17 Action to the Bankruptcy Court.

18 The Trustee believes that the TH Class Action violates the automatic stay
19 because the claim of the named plaintiff, Jun Dam, is derivative of the estate’s
20 claims against Perkins Coie. Based on the Trustee’s investigation, which is
21 ongoing, Jun Dam bought half his tokens on the secondary public market and
22 received another percentage of his tokens as a bonus for having referred other
23 investors.. As for the less than half his tokens purchased in the ICO, those tokens

1 “worked great,” as he testified at a hearing. Therefore, when his sale proceeds
2 were released from the Escrow, there was requisite power to service his tokens
3 and he was not directly affected by the premature disbursement of other
4 purchasers’ proceeds.

5 With that said, the Trustee believes that there are TH who do have direct
6 claims. However, despite encouragement and assistance from the Trustee, no such
7 TH has stepped forward. The Trustee has repeatedly stated to counsel for the TH
8 that he will enforce the automatic stay. He is actively considering moving to
9 enforce the stay in the TH Action until a new named plaintiff appears.

10 Dated: January 28, 2021 POTOMAC LAW GROUP PLLC

11 By: /s/ Pamela M. Egan
12 Pamela M. Egan (WSBA No. 54736)
13 *Attorneys for Mark D. Waldron as Chapter
7 Trustee, Plaintiff*

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